

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SALES TAX REFERENCE No. 7 of 1995****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE K.M.MEHTA**

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

=====

COMMISSIONER OF SALES TAX - Applicant(s)

Versus

CHOKSI NAGARDAS CHAKUBHAI & SONS - Respondent(s)

=====

Appearance :

MR SIRAJ GORI, AGP for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 13/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.M.MEHTA)

1. Commissioner of Sales Tax has made this Reference under Sec. 69 of the Gujarat Sales Tax Act, 1969 (hereafter to be referred to as "the Act") and has referred the

following question of law; before this Court for its determination.

"Whether on the facts and in the circumstances of the case, the Gujarat Sales Tax Tribunal was justified in law in allowing the second appeal and setting aside the order of the Assistant Commissioner of Sales Tax adopting the proportionate ratio method in respect of the consignment transfer of goods purchased from unregistered dealers?"

2. We have heard Mr. Siraj Gori, learned AGP for the State. Brief and relevant facts leading to the present Reference are as under on which he has invited our attention to the case.

2.1 The present opponent, M/s. Choksi Nagardas Chakubhai & Sons is a partnership firm, registered under the provisions of the Indian Partnership Act as well as the Gujarat Sales Tax Act, 1969. The opponent deals in gold and silver. The opponent makes purchases locally from registered dealers as also from unregistered dealers, of old ornaments of gold and silver. The opponent also purchases silver bullion. The opponent have been maintaining separate registers showing day to day purchases from registered dealers as also from unregistered dealers who sell the ornaments to the opponents. Out of the two precious metals, gold is subject to the Gold Control Order (at the relevant time) and, therefore, the old

ornaments purchased from the registered dealers as well as from unregistered dealers cannot be melted by the opponent at Ahmedabad in any manner and, therefore, the opponent has to carry the same in person to Bombay Government Mint after obtaining requisite permission of the Customs Department. So far as silver purchases are concerned, the old silver ornaments of pure bullion sold by the unregistered dealers are consigned to Bombay or are sold locally. At the time of consigning the same to Bombay, permission of the Customs Department is required to be obtained by way of Transfer Voucher or transport permit wherein the details regarding the name of consignor; the name of commission agent at Bombay; the weight in Kilogram; number of articles and their approximate value as also touch are to be shown. If they are despatched through a carrier or an Angadiya then the name of that person is also required to be given and the document containing all the aforesaid details are required to be countersigned by an Officer of Customs Department. The Customs Officer would put on that document the time of consignment, as also the probable time when it would reach destination. After the bullion reaches Bombay it is sold there in the market and the Adatia who sells it sends Ankada or account or realisation of the price after deducting therefrom the local tax and incidental expenses. The amount would then be sent by means of bank-draft or by bank transfer.

2.3 The Sales Tax Officer assessed the opponent for the assessment for the Samvat year 2031 [i.e 14.11.74 to 3.11.75].

At the time of assessment, the opponent claimed deduction of sales on the ground that consignment transfer to the tune of Rs. 1,73,64,803/- (Rupees One Crore Seventy Three Lacs Sixty Four Thousand Eight Hundred Three) were made and they should be deducted from the turnover of taxable sales. The Sales Tax Officer held that the opponent was able to produce "F" Form in respect of consignment transfer to the tune of Rs.91,04,511/- only but for the balance amount no such forms were produced. As against this, the opponent contended that for establishing the fact of consignment transfer production of "F" form was not an absolute necessity but he was able to prove by means of other reliable documentary evidence from the Government record that the disputed transfers were consignments amounting to Rs. 82,60,292/- (Eighty Two Lacs Sixty Thousand Two Hundred Ninety Two). The Sales Tax Officer rejected contentions and did not allow the consignment transfer to the full extent. The Sales Tax Officer determined the amount of total consignment transfers and thereafter deducted therefrom the element of profit and thereby determined the purchase price of the total consignment transfers. The Sales Tax Officer found that the purchases made by the opponent from the unregistered dealers amounted to 39 per cent of the total purchases whereas purchases made from registered dealers amounted to 61 per cent of the total purchases. The Sales Tax Officer (hereafter referred to as STO) applied the same ratio to the consignment transfers also. The second point canvassed before the Sales Tax Officer was concerning the assessment of

sales tax and purchases made from unregistered dealers and registered dealers. The Sales Tax Officer took the view that the purchases from unregistered dealers came to 39 per cent of the total purchases of gold and silver made by the opponent during the assessment year and 61 per cent of the total purchases were made from registered dealers against the certificates in Form 17B. The STO therefore, held that only 39 per cent of the consignment transfers related to purchases made from the unregistered dealers and the remaining 61 per cent of the consignment transfer were made in respect of the goods purchased against Form 17B which amounted to breach of declaration contained in the said Forms. In other words, the STO did not take into consideration the fact that whether on the date of each consignment transfer the opponent held sufficient stock of purchases made from unregistered dealer so as to cover the quantity of that pertinent consignment but applied the ratio method.

2.4 Being aggrieved and dissatisfied by the aforesaid order of the Sales Tax Officer, the opponent preferred an appeal before the learned Assistant Commissioner of Sales Tax (i.e. "Assistant Commissioner" in short). So far as the first point is concerned, the learned Assistant Commissioner held that the production of "F" Forms was not must for claiming consignment transfers and in the case of the opponent there was voluminous documentary evidence in the shape of letters bearing the seal of Superintendent of the Central Excise written to the Bombay

Mint for depositing ornaments and other documents. The Assistant Commissioner held that there was ample evidence to show that the opponent personally carried the ornaments to Bombay and sold them mostly to Chokshi Kirtilal Jesanglal & Co., and M/s. C. Damani & Co. Assistant Commissioner, therefore, considered all the transfers claimed by the opponent as consignments and allowed them to the full extent of Rs.1,74,64,803/-. In other words, the decision of the STO on the first point was reversed in the first appeal by the learned Assistant Commissioner and the opponent became successful to that extent. As regards the second point, the opponent contended before the Assistant Commissioner that, the Sales Tax Officer had wrongly adopted the ratio method by holding that only 39 per cent of the total purchases made from unregistered dealers were consignment transfers and 61 per cent of the consignment transfers related to purchases made from registered dealers against declarations in Form 17B and that the opponent had committed breach of the declarations in Form 17B to that extent. In Form 17B, a licensed dealer purchasing goods from a registered dealer is required to give a certificate that the goods purchased by him and shown in the certificate were intended either for resale by him within the State of Gujarat or in the course of inter-State trade and commerce or in the course of export out of India. According to the opponent, he had satisfactory documentary evidence with him to show that on the date of each consignment transfer he had with him on hand sufficient stock of purchases made from unregistered dealers

and, therefore, on these dates of consignments, he would not have consigned any purchases made against Form 17B from registered dealers. The opponent contended that it must be held that on the date of each such transfer he had transferred by consignment only these gold and silver ornaments or bullion which were purchased from unregistered dealers. The opponent contended that adoption of the ratio method was not legal or proper. In support of his contention, the opponent relied on the case of M/s. Liladhar Vaghajibhai Vs. State of Gujarat, [7 G.S.T.D. 5) decided by the Tribunal on 13th February, 1967 wherein it was held that when the balance of stock of goods purchased from registered dealers on a pertinent date is sufficient to effect the sale to a registered dealer, the assessee would be entitled to deduction in that behalf after necessary verification. The learned Assistant commissioner observed that though the opponent had maintained separate account regarding purchases made from the registered dealers and unregistered dealers, he had not maintained similar separate account of the actual despatches as consigned outside the State of Gujarat or sales within the State made out of each category and what stock remained on hand at the end of each date. According to him, the submission of the opponent can be accepted only if the opponent is able to show date-wise as to what he had transferred as consignment, was only out of the quantity of gold and silver which he had purchased from unregistered dealers and which were subsequently got converted into bullion at the Bombay Refinery. The opponent had produced

a statement showing date-wise purchases made from registered dealers and unregistered dealers and the stock on hand on each date in respect of the consignment transfer. The learned Assistant Commissioner did not think it proper to accept that evidence on the ground that after these purchases were made, both categories of purchases were amalgamated into one at the time of consignment of articles to Bombay Refinery for the purpose of melting the same and conversion. He placed reliance on the decision of the Bombay High Court in the case of **Commissioner of Sales Tax Vs. Berar Oil Industries (36 S.T.C. 173)**. He agreed with the finding of the Sales Tax Officer that the opponent had committed breach of the declarations in Form 17B by making consignment of goods which were purchased from registered dealers against certificates in Form 17B. It may be noted that the opponent conceded before the learned Assistant Commissioner that out of the total consignment transfers, consignments amounting to Rs.66,61,693/- were made by him in breach of the declarations in Form 17B and he was liable to pay tax to that extent only. According to the ratio method adopted by the Sales Tax Officer and approved by the Assistant Commissioner, the total consignment transfers in respect of purchases made from registered dealers amounted to Rs.1,04,67,032/- [Rupees One Crore Four Lac Sixty Seven Thousand Thirty Two).

2.5 Being dissatisfied by the aforesaid decision of the learned Assistant Commissioner, the opponent preferred second

appeal in respect of the second point stated above before the Gujarat Sales Tax Tribunal [hereafter referred to as "Tribunal"].

2.6 The Tribunal, by its judgment and order on 29.8.86, allowed the second appeal by remanding the matter to the Sales Tax Officer for fresh disposal. The Tribunal discussed the following relevant issue as under:-

"9] Looking to the nature of the business of the appellant it is neither practicable nor necessary for the appellant to keep separate accounts for two categories of gold and silver ornaments and to maintain separate and distinct accounts with regard to the bullion obtained out of these two categories. It is not in dispute that the activity of melting or refining old ornaments does not amount to an activity of manufacturing and, therefore, even after the ornaments are melted and refined, they remain for all practicable purposes ornaments. It is not understood how the refined quantity of silver representing the purchases from both the sources could maintain their separate existence, if what is obtained after refining is the same quality of silver. In these circumstances, if the appellant did not maintain separate and distinct account of each source of the bullion obtained from the refinery, then it would be of no consequence. Further, Section 58 of the Act makes

provisions concerning the accounts to be maintained by every dealer registered under the Act. That section as well as the Rules prescribed under the Act do not prescribe the mode of maintenance of such accounts as have been referred to by the learned Assistant Commissioner and the Commissioner has also not by any order directed the assessee to maintain such separate accounts for facilitating the assessment works. Section 58 of the Act casts an obligation upon the registered dealer to keep true accounts. It does not lay down any universal specified method on the manner of keeping the account. This section authorises the Commissioner, if he so chooses, to require a dealer by notice in writing, to keep such accounts in such form or manner as, in his opinion, is necessary for the purpose of proper assessment, provided the Commissioner considers that the accounts kept by the assessee are not sufficiently clear or intelligible to enable him to determine whether or not a dealer is liable to pay tax during any period, or he is of the opinion that the accounts kept are such as not to enable a proper scrutiny of the declarations, returns or the statements furnished. Very apparently in the present case, the Commissioner has not passed any such order as provided in sub-section (2) of section 58 of the Act and, therefore, there was no question of the present appellant maintaining the accounts in the manner as well as on the lines suggested by the learned Assistant

Commissioner in his impugned order. But even assuming that maintenance of such accounts was prescribed, even then, ipso facto on the failure of the maintenance of such accounts, the appellant cannot be penalised by adopting the pro-rata method if there is other material on record for finding out the correct and true position on a given date. If it is satisfactorily shown by the assessee that the quantity of old silver ornaments purchased by it from unregistered dealers exceeded or at least was equal to the quantity required for consignment transfer made on that date, then considering the facts of this case, it would be legitimate to infer that the transfers that were made by the assessee were out of the aforesaid quantity unless otherwise established positively by the Sales Tax Department that the silver bullion sent by the consignment transfers outside the State were bullion or ornaments purchased from registered dealers against Form 17B. In the present case, admittedly, the appellant produced account books as well as the purchase register and also a statement prepared therefrom and established that whenever he claimed to have made the consignment transfer he had sufficient stock of silver bullion purchased from unregistered dealers and, therefore, so long as the department does not establish positively by bringing proper and appropriate evidence that silver in dispute transferred by consignment outside the State was bullion or ornaments

purchased from registered dealers, the evidence of the appellant should be accepted and the Department cannot legitimately resort to the pro-rata method, as has been done in the instant case. There is great substance in the submissions made by the appellant in this behalf and the learned Assistant Commissioner should have accepted the same in the face of the materials before him. The observation of the learned Assistant Commissioner that after the ornaments were exchanged with refinery they lost their identity and, therefore, at the time of transfer or sale it was difficult to state that particular silver bars represented the old silver ornaments purchased from the unregistered dealers, has no importance or relevance in these circumstances. The appellant has definite evidence with him for satisfying the authority that the date on which the appellant claimed to have sent particular quantity of consignment transfer, the appellant had sufficient stock on hand of silver purchased from unregistered dealers. There is no reason why this evidence should not be accepted and indirect method of ratio proportion should be adopted.

Even the learned Assistant Commissioner has observed that had the appellant maintained a separate account of bullion received in exchange from each of the sources, then he would have accepted the plea of the appellant. In our view, that is not the only mode of satisfying the authority and any other lawful evidence produced by the

appellant should be considered as proper evidence for arriving at the decision on the issue."

2.7 After discussing the issue as above, the Tribunal allowed the second appeal and set aside the order of the learned Assistant Commissioner adopting the proportionate ratio method in respect of consignment transfer of goods purchased from the unregistered. The Tribunal remanded the matter to the Sales Tax Officer for fresh disposal with a direction that if the opponent satisfies the Sales Tax Office from the relevant record maintained by him that on the date of each consignment transfer, he had sufficient stock on hand of silver either in the form of ornaments or exchanged with silver bars purchased from unregistered dealers to meet with the quantity of the same consignment transfer, then the said transactions should be treated as consignment transfer of purchases made from unregistered dealers and not transfers of goods purchased against declaration in Form 17B.

2.7A Being aggrieved and dissatisfied with the same, the State of Gujarat preferred the present Reference Application before the Tribunal and the Tribunal allowed the same by order dated 29.4.94. In view of the said order, the question which we have referred herein above has come up before this Court for its consideration and decision.

3. When the aforesaid matter was placed for hearing, we

pointed out to Mr.Gori, learned counsel for the Applicant that the aforesaid question raised in Reference is pure question of fact depending upon certain facts of the case and there is no question of law arises. In this regard, Mr. Gori has tried to submit that the question raised in this Reference is partly a question of law as well as partly a question of fact and therefore, this Court may decide the matter in this behalf.

4. When we consider the case, we may also consider the salient scheme of the provisions of the Act. Section 8 of the Central Sales Tax Act provides for rate of tax on sales in the course of inter-state trade or commerce. Section 9 provides levy of tax and collection of tax and penalty. Section 13 provides power to make Rules. Under the said provisions, the Central Government has enacted Sales Tax (Registration) and Turnover Rules, 1957 and in the said Rules, Rule 12 provides that declaration and certificate referred to in sub-section (4) of Section (8) shall be in Form C and D respectively. Section 6 of the Act provides liability of tax to inter-state sales and burden of proof and etc. in case of transfer of goods claimed otherwise than by way of sale. Rule 12 provides Form F and it provides declaration to be issued by way of transfer. As regards the Local Tax Act is concerned, Gujarat Sales Tax Act is an Act to consolidate the amending law relating to levy of tax on the sale and purchase of certain goods in the State of Gujarat. Section-13 of the Gujarat Sales Tax Act provides for no deduction from turnover except on a certificate. Section

13(A) provides that the licensed dealer certifies in the prescribed form that the goods specified in Schedule-II Part B are intended for resale by him within the State of Gujarat otherwise than in the course of inter-State trade or commerce or export out of the territory of India within twelve months from the date of such purchase. Under the provisions of the said Act, "resale" is provided.

4(1) In exercise of powers conferred by Section 86 of the Gujarat Sales Tax Act, Government of Gujarat framed the Rules, which are called "the Gujarat Sales Tax Rules, 1970. Rule-24 provides form of certificate under Sections, 4,12,13, 19-B and 49. Rule 24-(2)(B) provides that a certificate for the purpose of clause (A)(ii)(a) of Section 13 shall be in Form-17B. Form-17B provides that a certificate by a licensed dealer purchasing the goods for the purpose of clause-11A of Section 13 of the Gujarat Sales Tax Act. If we peruse the complete scheme of the Central Sales Tax Act and the Local Sales Tax Act, it is quite clear that in this case, dealer has not committed any default in this behalf and therefore, the Tribunal was justified in remanding the matter, because in this case, findings of the Sales Tax Officer and Assistant Sales Tax Commissioner are quite different findings and therefore, the Tribunal was justified in remanding the matter. Therefore, we are of the view that the question raised by the present Reference is a question of fact and not a question of law, therefore, the question referred by the Tribunal is not to be considered. As

per Section 69(1) of the Act, all questions of fact are the questions to be decided by the Tribunal and the Court cannot go behind the findings of the Tribunal under Section 69. Reference to Court lies only of question of law.

4(2) We have also gone through the judgment of the Tribunal in **M/s. Liladhar Vaghajibhai Vs. State of Gujarat, [7 G.S.T.D. 5]**, wherein the Tribunal has held that when the balance of stock of goods purchased from registered dealers on a pertinent date is sufficient to effect the sale to a registered dealer, the assessee would be entitled to deduction in that behalf after necessary verification.

4(3) From the record, it appears that the Tribunal followed the judgment of the Bombay High court in the case of **Commissioner of Sales Tax Vs. Berar Oil Industries [36 S.T.C. 173]**. We may also state that a Division Bench of this Court in **Jayant Extraction Industries Vs. State of Gujarat, reported in 85 STC 3**, has also come across the case of a manufacturer. In that case, the applicant, a registered dealer, manufactured and sold, inter alia, hydrogenated vegetable oil. Some of the raw material was purchased from registered dealers against declaration in form 19 by which the dealer undertook to not sell the products manufactured therefrom outside the State. The end-product was sold both within the State and outside the State. The Sales Tax Officer found that there had been breach of the declaration in form 19 to the extent of one per cent,

levied tax and imposed a nominal penalty of Rs.100 only. In revision proceedings, the extent of violation was found to be about 43 per cent, and penalty of 10 percent of the purchase tax payable was imposed by the Assistant Commissioner. The Tribunal confirmed the order passed in revision, holding that the entries in the production register were notional and that the pro rata method of determination of the quantum of sales of goods manufactured from goods purchased against declaration in form 19 and from other goods was correct. On that a reference was made before this Court. In that context, this Court in para-18 of the judgment held that the Tribunal has rightly held that the principle laid down by it in case of purchase of finished goods from registered dealers and unregistered dealers and mixing up of the same cannot be applied to the manufacturing activity. However, on the facts found by the Assistant Commissioner and the Tribunal, even if one were to extent this principle to the manufacturing activity also, the same would not be available to the dealer. The Division Bench observed in paras 17 and 19 that the order of the Tribunal is correct. In para-19, the Division Bench has observed that the Tribunal has found that the entries of manufactured goods in the register in question and which have been bifurcated as available for sale in Gujarat and outside the State of Gujarat are notional. In view of this finding, the conclusion is irresistible that the maintenance of the production register is not actual, but it is notional, meaning thereby it is a creation of imagination of the dealer. Once it is found on the

facts of the case that the material reflected on the production register is nothing but figment of imagination of the dealer, it cannot be relied upon to indicate that a particular raw material was used in the manufacture of vegetable oil on a particular date. Except this production register, no other material is relied upon in support of the case put forth by the dealer. Once this register is held to be notional, the only reasonable method of calculating the user of goods purchased against declaration in form 19 and the sales outside the State (as well as inside the State) is the pro rata basis method, which is the one adopted by the Assistant Commissioner of Sales Tax and confirmed by the Tribunal. While arriving at this conclusion, the Tribunal has relied upon a decision of the Bombay High Court in the case of Commissioner of Sales Tax v. Berar Oil Industries reported in [1975] 36 STC 473. ... On Reference, the Bombay High Court restored the judgment and order passed by the Assistant Commissioner of Sales Tax and approved by the Deputy Commissioner of Sales Tax. The Bombay High Court held that the formula adopted by the Assistant Commissioner and approved by the Deputy Commissioner was proper and rational formula to be applied in estimating the turnover of purchases in such cases.

After referring to the said Bombay High Court judgment We are in respectful agreement with the reasons given and conclusion arrived at by the learned Judges of the Bombay High Court.

4[4] Similar view is taken by a Division Bench of this Court in the case of **Gujarat Steel Tubes Ltd. Vs. State of Gujarat, reported in [1995] 99 STC 556**, when Division Bench has also considered the similar point and has observed that when the entries in the register were notional and the register could not be relied upon to indicate that a particular raw material was used in the manufacture on a particular date, the only reasonable method of calculating the user of goods purchased against declaration in form 19 was pro rata basis method. Following the decision of the High Court of Bombay in *commissioner of Sales Tax Vs. Berar Oil Industries*, [1975] 36 STC 473, the Court held that such method was proper and formula applied in estimating turnover of purchases was rational. The Court also held that in view of the finding of fact that the production register reflected only notional entries, there was no escape from the conclusion that the pro rata basis adopted by the authorities was the only method available to the authorities. The Court held that the second point is thus concluded against the petitioner in the case of *Jayant Extraction Industries* [1992] 85 STC 3 [Guj.] Hence, to that extent the order cannot be said to be illegal or contrary to law.

5. We have gone through the record and proceedings. We have also noted the contentions raised by the learned counsel for the applicant. From the facts set out herein above, in view of

the findings of the Sales Tax Officer, Assistant Commissioner and the Tribunal, which we have referred herein above in extenso. In our considered view when Tribunal remanded the matter to the authority directing it to go through the record maintained by the dealer as to whether he had sufficient stock on hand of silver either in the form of ornaments or exchanged with silver bars purchased from unregistered dealers to meet with the quantity of same consignment transfer. The said facts are essentially question of fact and it does not deal with any question of law. There is no doubt that whether the goods are to be gold or consignment is also to be legally considered. The same depends upon the facts of the case and therefore, this is only a pure question of fact which we may refuse to answer in this behalf.

6. In view of the same, the Gujarat Sales Tax Tribunal was justified in law in allowing the second appeal and setting aside the order of the Assistant Commissioner of Sales Tax adopting proportionate ratio method in respect of consignment transfer of goods purchased from unregistered dealers, particularly, when the Tribunal remanded the matter. We answer the question in favour of the assessee and against the Revenue. The reference stands disposed of.

[R.S. GARG, J.]

[K.M. MEHTA, J.]

pirzada/-

